No. 75-610

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OCTOBER TERM, 1975

THE CITY OF HIGHLAND PARK, ILLINOIS, ET AL.,
PETITIONERS

v.

RUSSELL E. TRAIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

EDMUND B. CLARK,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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Petitioners brought a citizens suit in the district court, pursuant to Section 304 of the Clean Air Act, as added, 84 Stat. 1706, 42 U.S.C. 1857h-2, and later filed a petition for review in the court of appeals, pursuant to Section 307 of that Act, as added, 84 Stat. 1707, 42 U.S.C. 1857h-5, challenging the alleged failure of the Administrator of the Environmental Protection Agency to promulgate regulations to prevent significant deterioration of air quality in

areas with cleaner air than national standards. The district court dismissed for want of jurisdiction, petitioners having failed to comply with the 60-day notice provision of Section 304, and the court of appeals affirmed. The court of appeals also dismissed the petition for review, holding that the district court is the appropriate forum for claims of inaction by the Administrator.

We believe that the question whether failure to comply with the notice requirement of Section 304 temporarily defeats district court jurisdiction does not warrant review by this Court. We further believe that, although the court of appeals incorrectly dismissed the petition for review, it is not now appropriate for this Court to review the issue since the adequacy of the Administrator's significant deterioration regulations is currently *sub judice* in the Court of Appeals for the District of Columbia Circuit and, if the regulations are found inadequate, petitioners' goal will have been achieved and the issues presented here will have become academic. Furthermore, under the ruling of the court of appeals, petitioners are free to reassert their claims respecting the Administrator's alleged inaction in the district court, so long as they comply with the notice provision of Section 304.

Petitioners are two municipal corporations, a nonprofit private corporation, and various individuals opposing construction of a shopping center and highway expansion near Highland Park, Illinois. Initially they sought to challenge the failure of the Administrator of the Environmental Protection

Agency ("EPA")[1] to promulgate regulations to prevent violation of national ambient air standards by "complex" or "indirect" sources (facilities like shopping centers that do not themselves pollute but that attract polluting automobiles in large numbers).[2] During the litigation such regulations were promulgated (39 Fed. Reg. 7270), and petitioners thereafter directed their attack at the exemptions created by the regulations for complex sources that were completed or under construction before January 1,

[1] Petitioners also asserted various causes of action against the private developers and the Secretary of the Department of Transportation and that agency; only the issues relating to the Administrator's significant deterioration regulations are presented for review here.

[2] Under the Clean Air Act the Administrator was directed to establish national ambient air standards by April 30, 1971. 42 U.S.C. 1857c-4(a)(1). By January 31, 1972, the States were to have submitted for EPA review their implementation plans for timely attainment and subsequent maintenance of such standards. 42 U.S.C. 1857c-5(a)(1). The Administrator was directed to promulgate regulations setting forth a substitute implementation plan for any state plan or portion thereof that he disapproved. 42 U.S.C. 1857c-5(c). In *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 475 F.2d 968 (C.A.D.C.), the court ruled that it was not clear whether the state plans that the Administrator had already approved adequately provided for maintenance of national ambient air standards beyond the Act's target date of attainment (May 31, 1975), and directed the Administrator to re-review the maintenance provisions of all plans already approved. The Administrator found Illinois' maintenance provisions to be defective, in part because they failed adequately to deal with "indirect" or "complex" sources (Pet. App. A78). It then became the duty of the Administrator either to insist upon revision of the plan by the State itself, or to remedy the deficiency by regulation. 42 U.S.C. 1857c-5(c).

1975. The court of appeals ruled (Pet. App. A19-A21) that this challenge should have been brought by way of a petition for review in the court of appeals under Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1),[3] rather than in the district court. The court of appeals also noted that, since the record on appeal did not contain the record of the administrative proceedings, it was unable to evaluate the sufficiency of the Administrator's reasons for exempting certain complex sources. Petitioners do not complain of this aspect of the court of appeals' decision.[4]

Petitioners also sought to challenge the Administrator's alleged failure to promulgate regulations to prevent significant deterioration of air quality standards in areas with air cleaner than national standards.[5] EPA argued that the district court was not

[3] That Section provides, in relevant part, that "review of the Administrator's action in * * * promulgating any implementation plan under section 1857c-5 * * * may be [had] only in the United States Court of Appeals for the appropriate circuit."

[4] The court of appeals noted that petitioners had also filed a separate petition for review of the complex source regulations, and that it had been transferred, along with other similar petitions filed in other circuits, to the Court of Appeals for the District of Columbia Circuit (Pet. App. A22). Thus it appears that petitioners are assured complete judicial review of their challenge to these regulations.

[5] In *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), affirmed *per curiam*, 4 E.R.C. 1815 (C.A.D.C.), affirmed by an equally divided court *sub nom. Fri* v. *Sierra Club*, 412 U.S. 541, the court ruled that the Administrator's approval of state implementation plans that did not prevent significant deterioration was invalid. The agency was ordered to disapprove

the appropriate forum for such a challenge: since the significant deterioration regulations that had already been promulgated, and any that might be promulgated in the future, were to be incorporated into the states' implementation plans, the court of appeals was the proper forum under Section 307 (Pet. App. A79-A80). The district court declined to decide the issue. Instead it ruled that (Pet. App. A81), even assuming the action was properly brought under Section 304(a)(2), which authorizes citizen suits in the district court "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary," petitioners had failed to establish jurisdiction because they had not complied with Section 304(b)'s requirement that "[n]o action may be commenced" thereunder "prior to 60 days after the plaintiff has given notice" of the alleged violation to the Administrator.

The court of appeals agreed that petitioners' failure to comply with the notice provision of Section 304 deprived the district court of jurisdiction under the Clean Air Act (Pet. App. A23-A25). It also held that petitioners could not avoid compliance with the Act's review provisions by asserting jurisdiction under the Administrative Procedure Act or 28 U.S.C. 1331 or 1361 (Pet. App. A26-A29).

state plans insofar as they failed to prevent such deterioration and to promulgate regulations that would prevent such deterioration. The Administrator has issued such regulations for two of the six pollutants for which national ambient air standards have been established; petitioners say that these regulations do not go far enough since they do not cover the remaining four.

Finally, it dismissed petitioners' petition for review filed directly in the court of appeals: "The appropriate procedure for compelling the Administrator to act is that provided in section 304(a), * * * which expressly provides for an action in the district court 'against the Administrator when there is alleged a failure of the Administrator to perform any act or duty under this Act [*sic*] which is not discretionary with the Administrator.' Plaintiffs recognized this when they brought their action under section 304(a) but they failed to give statutory notice that would have made their action viable" (Pet. App. A37-A38).

1. Section 304 authorizes suits in the district courts charging the Administrator with failure to perform a nondiscretionary duty under the Act; Section 307 restricts review of the Administrator's approval or promulgation of any implementation plan under Section 110 to the court of appeals for the appropriate circuit. The question whether the action should be in the district court or the court of appeals arises when the claim is made that the Administrator, in promulgating regulations, has not gone far enough. See *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 512 F.2d 1351, 1356-1357 (C.A.D.C.).[6]

[6] That case does not create a conflict with the decision below. There the Administrator issued final regulations regarding leaded gasoline which did not include various provisions that had been proposed for adoption, and plaintiffs petitioned for review in the court of appeals of the regulations as issued. The court held that plaintiffs were not entitled to attorneys' fees since only Section 304, authorizing citizen suits in the district courts, provides for such an award. The court was not called upon to decide which forum was appropriate and thus the decision cannot be read to say that "jurisdiction could rest either in the district court or the court of appeals" (Pet. 15), especially in light of the court's statement that "sections 304 and 307 contemplate distinct groups of cases" (512 F.2d at 1355).

Our view, consistently stated throughout this litigation[7] and in other cases in which the issue has arisen, is that such cases should go to the court of appeals for the appropriate circuit. Regulations such as those designed to prevent significant deterioration are meant to be incorporated into state plans and as such are promulgated under Section 110, which directs the Administrator to promulgate, by regulation, substitute implementation plans for States whose plans are found deficient. Before such regulations are issued in final form they are noticed for promulgation and ample opportunity is provided for the expression of views by those who would oppose, support, or amend them. Direct review in the court of appeals on the administrative record avoids wasting the time and resources necessary to formulate yet another record in the district court where the facts and

[7] On appeal we urged that the Administrator had already issued adequate regulations to prevent significant deterioration as required by the *Sierra Club* decision, *supra*, note 5, and that petitioners' allegations were therefore moot. We also took the position, however, that petitioners' challenge to the significant deterioration regulations was in any event properly brought only in the court of appeals. Accordingly, we did not oppose the filing of their petition for review, but instead sought to transfer it to "the appropriate circuit," see text accompanying note 9, *infra*.

arguments adduced are not likely to differ significantly from or augment those made in the administrative proceeding.[8] Cf. *Anaconda Company* v. *Ruckelshaus*, 482 F.2d 1301 (C.A. 10), in which the court held that plaintiff's complaint that the Administrator was about to promulgate regulations without having granted it a full adjudicatory hearing and without having filed an environmental impact statement was essentially an attack on the proposed state plan and thus should have been filed in the court of appeals.

Accordingly, we believe that the court of appeals in the instant case should not have ruled that the district court, rather than the court of appeals, was the appropriate forum for petitioners' challenge regarding the significant deterioration regulations. There are nonetheless compelling reasons for the denial of this petition.

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[8] This is apparently the view taken by Judge Pratt in the District Court for the District of Columbia Circuit, who initially allowed plaintiffs to challenge under Section 304 the Administrator's decision that he lacked authority to require States to include significant deterioration provisions in their implementation plans. *Sierra Club* v. *Ruckelshaus, supra*, note 5. Judge Pratt has since ruled that once the Administrator promulgates such regulations (as he now has) review may be had only in the court of appeals under Section 307. *Sierra Club* v. *Train*, D.D.C., No. 1031-72, decided November 15, 1974.

Moreover, this approach avoids the complex jurisdictional problems that might otherwise arise in regard to a petition for review that not only claims the Administrator has improperly failed to cover certain subjects in his regulations but also that the regulations that were issued are defective in other respects.

There are currently pending in the Court of Appeals for the District of Columbia Circuit 14 consolidated review petitions challenging the Administrator's significant deterioration regulations.[9] *Sierra Club* v. *Environmental Protection Agency*, No. 74-2063.[10] The issues to be decided in those cases include the question whether the Administrator is authorized to issue any such regulations and—the question upon which petitioners sought judicial review here—whether the regulations that have been promulgated are deficient for not including limitations respecting several automobile pollutants (see *supra*, note 5). Various of the petitions were originally filed in the Courts of Appeals for the District of Columbia, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits; they have been consolidated in the District of Columbia Circuit upon a determination that that is "the appropriate circuit" under Section 307. See *Dayton Power & Light Co.* v. *Environmental Protection Agency*, 520 F.2d 703 (C.A. 6).

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[9] When petitioners filed their petition for review in the court of appeals in this case, the government moved that it be transferred to the District of Columbia Circuit. Petitioners resisted the motion, however, arguing that their petition for review should be heard with their appeal from the district court's decision since the issue in the consolidated cases was the adequacy of the regulations promulgated rather than the Administrator's "failure" to promulgate more regulations. The court of appeals agreed with petitioners and refused to transfer the petition.

[10] Briefs have been filed but as of this writing oral argument has not been scheduled.

Since all of petitioners' objections concerning the significant deterioration regulations are being presented in the consolidated District of Columbia litigation, a decision adverse to the Administrator may well satisfy petitioners and moot the forum-selection issues presented here before this Court could consider the matter. Moreover, under the decision below petitioners may renew their claims in the district court so long as they comply with the notice requirements of Section 304, which they have as yet failed to do.

Furthermore, if this Court were to grant the petition and rule that petitioners' claims were appropriately raised by way of petition for review under Section 307 (a ruling we would favor), the Seventh Circuit on remand would likely transfer the review petition to the District of Columbia Circuit, as it recently did with another review petition concerning the significant deterioration regulations. *Indiana-Kentucky Electric Corp.* v. *Environmental Protection Agency*, C.A. 7, No. 74-2055, decided May 21, 1975.[11] Finally, contrary to petitioners' assertion (Pet. 15-16), there is no direct conflict among the circuits regarding whether claims such as those presented by petitioners should be heard in the courts of appeals.[12]

[11] If the consolidated cases in the District of Columbia Circuit had by that time been decided, petitioners' suit would presumably be resolved accordingly.

[12] For the reasons stated *supra*, note 6, *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 512 F.2d 1351 (C.A.D.C.), does not conflict with the decision below. Nor does *Anaconda Company* v. *Ruckelshaus, supra*, which involved the question whether proposed regulations could be challenged in district court on the grounds that the Administrator had not filed an environmental impact statement or provided the plaintiff a full adjudicatory hearing in connection with the regulations. There the court held that the appropriate course was an action in the court of appeals when the regulations became final; it said nothing as to the appropriate forum for a claim that promulgated regulations do not go far enough. Moreover, the Seventh Circuit's transfer of *Indiana-Kentucky Electric Corp.* v. *Environmental Protection Agency, supra*, to the District of Columbia Circuit may indicate that the law in the Seventh Circuit on this issue is still in a state of development.

In short, although we disagree with the decision of the court of appeals on the question of the appropriate forum for petitioners' challenge concerning the significant deterioration regulations, the posture of this case makes it inappropriate for review of that issue.

2. In ruling that petitioners may not avoid compliance with the 60-day notice provision of Section 304 by invoking the jurisdiction of the district court under some other statute, the court of appeals decided this issue in a way that is inconsistent with decisions of two other circuits regarding a similar issue under Section 304(b)(1)(A) of the Federal Water Pollution Control Act, as added, 86 Stat. 850, 33 U.S.C. (Supp. IV) 1314(b)(1)(A). See *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692 (C.A.D.C.); *Natural Resources Defense Council, Inc.* v. *Callaway*, C.A. 2, No. 75-7048, decided September 9, 1975. Nevertheless, we believe that the issue does not now warrant review by this Court.

As a practical matter, the effect of the decision below is simply to compel a litigant to give the

Administrator notice and then to wait 60 days before commencing suit. A dismissal for failure to give notice is not a determination on the merits and does not preclude a plaintiff from promptly initiating an action with proper regard for the notice provision.[13] In any event, whether the 60-day notice provision for district court actions is mandatory is a question this Court could reach only if it first determined that review of petitioners' claims must be in the district court, not the court of appeals. We have discussed above why we believe it is inappropriate in this case for the Court to grant certiorari in order to decide this threshold issue.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

EDMUND B. CLARK,
Attorney.

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[13] Contrary to petitioners' assertion (Pet. 9, 15), the decision below does not preclude review of claims of abuse of discretion. Under the rationale of the court of appeals, if such a complaint were not cognizable under Section 304 then presumably it could be brought under one or more of the other jurisdictional statutes discussed by the court. As that court said (Pet. App. A29), "We are not holding that if the remedy provided by the statute were inadequate in the circumstances of a particular case, other remedies would be unavailable."

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